Supreme Court, U. S.
FILED
NOV 15 1979
MICHAEL RODAK, JR., CLERK

No. 79-45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

GERALD A. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA AND COMMISSIONER OF BANKING OF THE STATE OF FLORIDA, *Appellant*.

v.

BT INVESTMENT MANAGERS, INC., ET AL., *Appellees*.

On Appeal from the United States District Court for the Northern District of Florida

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BRIEF ON BEHALF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

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BRIEF ON BEHALF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

This brief is filed under Rule 42(1) of the Rules of this Court, with the consent of all parties to the case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Florida is reported at 461 F. Supp. 1187 (N.D. Fla. 1978). The order of March

22, 1979, altering and amending the order of December 15, 1978, is not reported but is set out in an appendix to Appellant's Jurisdictional Statement (App. D1-D2).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions involved are set forth fully in the Appellant's Jurisdictional Statement, and are not repeated here.

QUESTIONS PRESENTED

1. Whether the court below erred in holding that Florida Statutes § 659.141(1) (1977), which prohibits holding companies, banks, and trust companies that do not conduct their operations principally in Florida from owning or controlling any trust company or investment advisory business that does conduct its business in Florida, is invalid under the Commerce Clause of the United States Constitution.

2. Whether Florida Statutes § 660.10 (1977), which regulates the provision of personal fiduciary services, an area of traditional and long-standing state concern, is invalid under the Commerce Clause of the United States Constitution simply because it may have the effect of prohibiting certain categories of out-of-state business entities from providing such services in-state.

3. Whether Congress, in either section 3(d) or section 7 of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1842(d) and 1846 (1976), has authorized Florida and other states with similar statutes to enact provisions such as those contained in Florida Statutes § 659.141(1) and § 660.10.

INTEREST OF AMICUS

The Conference of State Bank Supervisors ("the Conference") is an association composed of the officials of state governments responsible for the regulation of state-chartered banking institutions in every state of the United States and in Guam, Puerto Rico, and the Virgin Islands. As of December 31, 1978, the Conference's members had jurisdiction over 10,275 state-chartered commercial and mutual savings banks with total resources of approximately $659 billion. The Conference invited state-chartered banks and mutual savings banks to become "associate members" in 1958. There are currently 5,960 such members.

The Conference's Board of Directors, consisting entirely of members (*i.e.*, state bank supervisors), has authorized the filing of this brief because the decision below, if allowed to stand, will significantly undermine the traditional authority of the states to regulate the provision of personal fiduciary services—an area which has never been regulated to any significant extent by Congress and has always been left almost entirely to the states. In short, the decision below is important not only with respect to the Florida statutes directly involved, but also because it will, if upheld by this Court, have the effect of invalidating or otherwise bringing into question comparable provisions in the statutes of many other states as well.[1]

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[1] A list of illustrative state statutes which would be invalidated under the rationale of the decision below is provided in the Appendix to this brief. *See infra*, p. 38.

Although Amicus New York Clearing House Association contends that state statutes which prohibit out-of-state corporations from providing fiduciary services in-state are not placed in jeopardy by the decision below (*see* Brief in Support of the Motion

STATEMENT

Bankers Trust New York Corporation ("BTNYC"), incorporated in New York State, is a "bank holding company" as defined in section 2(a) of the Bank Holding Company Act of 1956 ("1956 Act"), 12 U.S.C. § 1841(a) (1976). BTNYC organized and incorporated, under Delaware law, a wholly-owned subsidiary, BT Investment Managers, Inc. ("BTIM"), which subsequently qualified to do business in Florida.

Under section 4(c)(8) of the 1956 Act, a bank holding company like BTNYC must secure permission from the Board of Governors of the Federal Reserve System to own or control shares of a company, the activities of which are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8) (1976). The Board of Governors, pursuant to its authority under the Bank Holding Company Act Amendments of 1970, § 103(4), 84 Stat. 1760, 1765, has determined that the performance of certain trust functions and the provision of investment or financial advice are such closely related activities. 12 C.F.R. §§ 225.4(a)(4) and 225.4(a)(5) (1979).[2]

to Affirm at 4, n.5), the constitutionality of such statutes is clearly within the purview of the decision below (*see* 461 F. Supp. at 1196) and the questions presented for review by this Court. *See* Appellant's Jur. St. at 4; Appellee's Motion to Affirm at 5.

[2] After the judgment below was entered, but before this appeal was filed, the United States Court of Appeals for the District of Columbia Circuit invalidated the regulation and interpretive ruling of the Board of Governors of the Federal Reserve System (12 C.F.R. §§ 225.4(a)(5)(ii), 225.125), insofar as they allowed bank holding companies to operate closed-end investment companies. The Court of Appeals concluded that Congress, in enacting and amending section 4(c)(8) of the Bank Holding Company Act, had not intended to permit bank holding companies to engage in such activities. *Investment Company Institute* v. *Board of Governors of the Federal Reserve System*, —— F.2d ——, No. 77-1862 (D.C. Cir., March 30, 1979). The Board had earlier decided that bank holding companies could not be allowed to operate open-end investment companies. 12 C.F.R. § 225.125(f). Although the *Investment Company Institute* decision is not directly relevant to the issues presented in this case, its rationale calls into question the continued authority of the Federal Reserve Board to approve the provision of investment advisory services by bank holding companies such as BTNYC not only with respect to closed-end investment companies but to other types of business entities and persons as well. *See* slip. op. at 2, 39-40.

BTYNC applied to the Board of Governors for authorization to begin providing investment advisory services through BTIM in Palm Beach, Florida. Among the clients BTIM intended to serve were persons vacationing in Florida who normally relied on BTNYC to handle their investments and wished to obtain investment advice from a Florida office of the same company during the time they were away on vacation. 461 F. Supp. at 1195.

On April 26, 1973, the Board denied BTNYC's application. 59 Fed. Res. Bull. 364, 367 (1973). The Board indicated that, while it favored the application in principle, it was required to deny approval because of a 1972 amendment to the Florida Statutes section 659.141(1). While section 659.141(1) had previously prohibited out-of-state control of a Florida business which sold investment advisory services to Florida banks and trust companies, the 1972 amendment expanded this prohibition to include out-of-state control of a business that sells such services to any customer. Florida Statutes § 659.141(1) (1977); *see* 59 Fed. Res. Bull. at 366-67. In denying the application because of the Florida law, the Board specifically relied on section 7 of

the 1956 Act, 12 U.S.C. § 1846 (1976), and *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, explaining that, ". . . section 7 of the Act expressly reserves to the States the authority to adopt legislation in the exercise of their powers and jurisdiction with respect to banks, bank holding companies, and their subsidiaries, and the U.S. Supreme Court in *Whitney* expressly instructed the Board to consider the applicability and effect of any such legislation." 59 Fed. Res. Bull. at 366.

BTNYC and its subsidiary BTIM then attacked the constitutionality of sections 659.141(1) and 660.10 of the Florida Statutes by bringing an action against the Comptroller of Florida in the federal district court for the Northern District of Florida. They sought declaratory and injunctive relief against the enforcement of both statutes.

The court initially abstained from construing the two Florida laws, pending interpretation of them by the Florida courts, but the United States Court of Appeals for the Fifth Circuit held that the abstention doctrine was not applicable and remanded the case for a decision on the merits. *See BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950 (5th Cir. 1977).

On remand, the entire factual record upon which the case was decided consisted of a stipulation of facts entered into by the Comptroller and BTNYC. This stipulation, dated May 11, 1978, states, *inter alia,* that but for the existence of the challenged statutes, BTNYC would have applied to the Board of Governors of the Federal Reserve System for authority to engage, through a subsidiary trust company, in the activity of performing at a place of business in Florida one or

more functions that may be undertaken by a trust company under Florida law. 461 F. Supp. at 1193-94.

The three-judge district court held that both Florida statutes were *per se* unconstitutional under the Commerce Clause of the United States Constitution. 461 F. Supp. at 1196. The court further held that federal law did not permit Florida to enact the otherwise unconstitutional statutes. Specifically, the court held that section 7 of the 1956 Bank Holding Company Act, 12 U.S.C. § 1846 (1976), allowed the states only to continue regulating bank holding companies within the pre-existing scope of their constitutional authority and did not permit the states to extend that authority. 461 F. Supp. at 1199. The court also held that section 3(d) of the 1956 Act, 12 U.S.C. § 1842(d) (1976), narrowly applied only to state laws governing holding company acquisitions of commercial banks and did not cover laws governing the acquisition of trust services or investment advisory services. 461 F. Supp. at 1199-1200.

The original judgment entered by the court below enjoined the Comptroller from enforcing against appellees the entire first sentence of section 659.141(1). However, by a later order dated March 22, 1979, the court amended its original judgment by excluding banks from the purview of the order. Consequently, the order, as finally amended, enjoins the Comptroller from enforcing section 659.141(1) both as to trust companies and investment advisory services but not as to banks. The court declined to grant a similar injunction against the enforcement of section 660.10 on the grounds that BTNYC had not yet attempted to establish a subsidiary trust service and that the grant of an injunction would therefore be premature. 461 F. Supp. at 1201.

Appellant filed a Notice of Appeal in the District Court of the Northern District of Florida on May 11, 1979, and on October 1, 1979, this Court noted probable jurisdiction.[3]

ARGUMENT

I. The Commerce Clause Does Not Invalidate Either of the Florida Statutes Held Unconstitutional by the Court Below.

A. Fiduciary and investment advisory services provided entirely in-state do not substantially affect interstate commerce and are therefore not within the purview of the Commerce Clause.

Article I, Section 8, Clause 3 of the Constitution gives Congress the "power . . . to regulate commerce . . . among the several states. . . ." This includes both a positive grant of power to Congress to regulate commerce and "negative implications" which limit state interference with interstate commerce. L. Tribe, *American Constitutional Law* § 6-2 at 320 (1978).

For purposes of applying the Commerce Clause, the definition of "interstate commerce," while broad, is not without limits.[4] As *United States* v. *Oregon State Medical Society,* 343 U.S. 326, makes clear, personal *services* provided on an *intrastate* basis which do not have a substantial effect on interstate commerce do not constitute "commerce among the several states" within the meaning of Article I, Section 8, Clause 3 of the United States Constitution. 343 U.S. at 338.

The present case presents a different situation from those typically presented to this Court for resolution under the negative implications of the Commerce Clause. Most cases in which this Court has struck down state regulations as violative of the Commerce Clause

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[3] While this case was pending below, and unknown to the court below, a subsidiary of BTNYC was authorized by the Division of Securities of Florida to conduct investment advisory services in Florida under the "grandfather" provisions of Florida Statutes section 659.141(3). This authorization is limited to "one office," and does not permit BTNYC to conduct investment advisory business in Florida generally or through any other subsidiary or office.

The judgment of the court below enjoined the Appellant "from enforcing against plaintiffs the aforesaid portion of the first sentence of Florida Statutes § 659.141(1)." This is the portion relating to trust services and investment advisory services. Appellant's Jur. St. at E3. Consequently, the injunction granted by the court below does effectively restrain the State of Florida from preventing the appellees from opening additional offices, or from organizing additional subsidiaries, for the purpose of conducting the investment advisory business or offering trust services in Florida. For this reason, the case is not moot, and this Court retains jurisdiction under 28 U.S.C. § 1253 to decide the question of the general constitutional validity of Florida Statutes section 659.141(1), and the related question of the constitutionality of Florida Statutes section 660.10.

[4] Until recently, it appeared that this Court employed a "two-tiered" definition of "commerce," in which the definition for purposes of assessing the reach of Congress' power to enact legislation was considerably broader than that employed for assessing the permissible scope of state legislation. *See, e.g., United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533, 544. It is clear now, however, that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes* v. *Oklahoma,* —— U.S. ——, 99 S. Ct. 1727, 1731, n.2; *see Philadelphia* v. *New Jersey,* 437 U.S. 617, 622.

The Conference does not contend that the provision of fiduciary and investment advisory services is not "commerce"; it does contend, however, that these essentially local services do not substantially affect interstate commerce and therefore do not come within the purview of the Constitutional clause giving Congress power "to regulate commerce among the several states." *See infra,* at p. 9-12.

involve the movement of *goods* across state lines,[5] or restrictions placed on the instrumentalities used for transporting such goods.[6] In these cases it is a relatively straightforward matter to determine that interstate commerce is substantially affected by state regulations which impinge on or otherwise restrict the interstate movement of such goods.

This case arises in a different context, where the subject of commerce is not goods or the means of transporting those goods, but rather the provision of personal one-on-one services on a local basis.[7] In this case the nexus with interstate commerce is much less obvious than those in which the movement of goods is involved, and the judicial inquiry as to the substantiality of the nexus with interstate commerce is correspondingly more difficult. Consequently, proof of a substantial effect on interstate commerce is required, and

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[5] *See, e.g., Hughes* v. *Oklahoma,* —— U.S. ——, 99 S. Ct. 1727; *Philadelphia* v. *New Jersey,* 437 U.S. 617; *Hunt* v. *Washington Apple Advertising Comm'n,* 432 U.S. 333; *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366; *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137; *Dean Milk Co.* v. *Madison,* 340 U.S. 349; *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525. *Cf. Can Manufacturers Institute, Inc.* v. *Minnesota,* No. 371, slip op. at 8 (Minn. Sup. Ct., Sept. 7, 1979) (noting that in cases considering burdens on interstate commerce this Court has dealt largely with regulations that affect the transportation and flow of goods).

[6] *See, e.g., Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429; *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. 520; *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761.

[7] As the court below noted, "[t]he typical clients plaintiffs intend to serve in the Palm Beach office of BTIM are persons vacationing in Florida who during the bulk of the year rely on BTNYC to handle their investment portfolios and who would likely wish to obtain investment advice during vacation from a Florida office of the same company." 461 F. Supp at 1195.

not every incidental and remote effect will transform what is primarily a service rendered on "a local plane" into a service having a "substantial" effect on interstate commerce. *See* 343 U.S. at 339.

The "substantial effect" prerequisite has not been adequately established in this case for, as the court below noted, no direct evidence on that matter was ever presented to the court. 461 F. Supp. at 1195. Instead, the court below hypothesized that the necessary effect on interstate commerce was present because the persons to whom BTIM would provide investment advice would include persons who had crossed states lines to utilize those services; that providing investment advisory services would perforce affect stocks and bonds; and that the investment advisory services would involve the use of communications media which crossed state lines. 461 F. Supp. at 1195.

None of these incidents, however, is sufficient to constitute a substantial effect on interstate commerce. The movement of BTNYC's customers across state lines is not sufficient, for the "[m]ere movement of individuals from one state to another to use particular services does not convert those services into interstate services. . . ." *Diversified Brokerage Services, Inc.* v. *Greater Des Moines Board of Realtors,* 521 F.2d 1343, 1346 (8th Cir. 1975); *see United States* v. *Oregon State Medical Society,* 343 U.S. at 338-39.[8] Nor is the possibility that

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[8] *See also United States* v. *Yellow Cab Co.,* 332 U.S. 218, 230; *Evanston Cab Co.* v. *Chicago,* 325 F.2d 907, 909-13 (7th Cir. 1963), *cert. denied,* 377 U.S. 943; *Elizabeth Hosp., Inc.* v. *Richardson,* 269 F.2d 167, 170-71 (8th Cir. 1959), *cert. denied,* 361 U.S. 884; *Hotel Phillips, Inc.* v. *Journeymen Barbers,* 195 F. Supp. 664, 667-69 (W.D. Mo. 1961)), *aff'd,* 301 F.2d 443 (8th Cir. 1962).

communications and financial transactions incident to those services may cross state lines dispositive, *see United States* v. *Oregon State Medical Society,* 343 U.S. at 339, and the court below made no attempt to show exactly how the provision of investment portfolio advice to individuals vacationing in Florida would impact or otherwise affect the interstate flow of stocks and bonds.

In short, not every intrastate activity which has an effect on interstate commerce will be transformed into "interstate commerce" for purposes of the Commerce Clause; those seeking to bring essentially intrastate services within the purview of the Commerce Clause must demonstrate that such services have a "substantial" effect on interstate commerce. In light of the lower court's acknowledgement that no direct evidence was presented on this question, it is difficult, if not impossible, to conclude that appellees' burden of proof on this element has been met. *See Hospital Building Co.* v. *Trustees of the Rex Hospital,* 425 U.S. 738, 747, n.5; *Diversified Brokerage Services, Inc.* v. *Greater Des Moines Board of Realtors, supra,* 521 F.2d at 1347.[9]

[9] The lack of such evidence distinguishes this case from *Hospital Building Co.* v. *Trustees of the Rex Hospital,* 425 U.S. 738. That case arose on a motion to dismiss a complaint which, as this Court held, had alleged facts sufficient to establish the requisite effect on interstate commerce. 425 U.S. at 744. In this case, which went to trial on the basis of a stipulation of facts, no direct evidence on this question was presented to the court below, 461 F. Supp. at 1195, and the stipulation itself contained no facts addressed to this question.

B. Even if the provision of intrastate fiduciary and investment advisory services can be deemed to constitute interstate commerce within the purview of the Commerce Clause, Florida Statutes Sections 659.141(1) and 660.10 do not discriminate against or otherwise impermissibly burden "commerce . . . among the several states."

The delineation by this Court of the scope of permissible state regulation under the Commerce Clause is both evolutionary and dynamic for "[t]he cases defining the scope of permissible state regulation in areas of Congressional silence reflect an often controversial evolution of the rules to accommodate federal and state interests."[10] Consequently, ". . . the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated. . . ."[11]

Because of the continuing evolution of this Court's thinking in the difficult area of accommodating federal and state interests, we turn to the most recent guidelines developed by the Court. These guidelines, set forth in *Hughes* v. *Oklahoma,* —— U.S. ——, 99 S. Ct. 1727, 1736, teach that several specific inquiries should be made in determining the scope of permissible state regulation under the Commerce Clause:

(1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

(2) whether the statute serves a legitimate local purpose; and, if so,

[10] *Hughes* v. *Oklahoma,* —— U.S. ——, ——, 99 S. Ct. 1727, 1736.

[11] *Pike* v. *Bruce Church, Inc.,* 397 U.S. at 142.

(3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Moreover, "the burden to show discrimination rests on the party challenging the validity of the statute. . . ." —— U.S. at ——, 99 S. Ct. at 1736. As will be shown below, appellee has not met this burden of proof under the applicable principles set forth in *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117.

1. *Sections 659.141(1) and 660.10 of the Florida Statutes do not discriminate against interstate commerce.*

Appellee asserts that the statutes at issue in this case are blatantly discriminatory, and further asserts that a finding of such discrimination necessarily ends the Court's inquiry and itself justifies a finding of *per se* illegality. Motion to Affirm at 15-24. Neither of these contentions is correct under applicable principles recently enunciated by this Court.

Three recent decisions of this Court are particularly applicable to state statutes, such as those challenged in this case, that are alleged to discriminate against interstate commerce. *Philadelphia* v. *New Jersey,* 437 U.S. 617; *Hughes* v. *Oklahoma,* —— U.S. ——, 99 S. Ct. 1727; and *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117.

Philadelphia v. *New Jersey* tested the constitutionality of a New Jersey statute and attendant regulations which banned the importation into New Jersey of virtually all solid and liquid waste. 437 U.S. at 618-19. This Court held the New Jersey legislation invalid because it had the effect of "overtly block[ing] the flow of interstate commerce at [the] State's borders," and further implied that such legislation could be subjected to a "virtually *per se* rule of invalidity." 437 U.S. at 624.

In *Hughes* v. *Oklahoma,* this Court again dealt with a state statute which blocked the flow of interstate commerce at the state's borders. The challenged statute there forbade the transportation of minnows out of state for sale. —— U.S. at ——, 99 S. Ct. at 1730. Although the statute in *Philadelphia* had the effect of keeping certain goods out of the state and the statute in *Hughes* had the effect of keeping a certain commodity inside the state, that difference was immaterial because the central objection in both cases was the same: both statutes in purpose and effect stopped the shipment of certain goods at the state's borders. 437 U.S. at 628. Furthermore, despite its finding that the statute in *Hughes was* discriminatory on its face, this Court did not end its inquiry there. While acknowledging that "facial discrimination *may* itself be a fatal defect . . ." (99 S. Ct. at 1737, emphasis added), this Court indicated that such facial discrimination did not *require per se* treatment, as appellee asserts it does. *See* Motion to Affirm at 27-28.

The rationale of the last case, *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (which the court below did not discuss or cite), is most relevant to the instant case. In *Exxon,* this Court considered a Maryland law which prohibited all producers and refiners of petroleum products from operating retail service stations in Maryland or from discriminating between customers providing certain price discounts. 437 U.S. at 119-20.

Because there were no producers or refiners of petroleum products in Maryland, the impact of the state law fell entirely on out-of-state refiners and producers, such as Exxon, that operated service stations in Maryland. As appellee does in this case (*see* Motion to Affirm at 15-18), Exxon argued that the effect of the statute was to protect in-state independent dealers from out-of-state competition and was therefore clearly protectionist. 437 U.S. at 125-27. This Court disagreed, noting that the statute did not *totally* block interstate marketers of petroleum from entering the Maryland market, because out-of-state independent dealers, who did not refine or produce gasoline, would continue to have full access to the Maryland market. The Court concluded that "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." 437 U.S. at 126.

The reasoning in *Exxon* is fully applicable to this case. In contrast to the statutes at issue in *Hughes* and *Philadelphia,* the statute in *Exxon* did not prohibit the interstate movement of articles of commerce; rather, it had the effect of merely limiting the control of in-state outlets to certain types of interstate dealers. Similarly, in the instant case, the Florida statutes at issue do not prohibit the flow of fiduciary services into or out of Florida; rather, they, like the statute in *Exxon,* merely limit in-state outlets to local persons and specific types of out-of-state concerns. Under the principles set forth in *Exxon,* this limitation is permissible, for, as Mr. Justice Blackmun explained in his separate opinion, *Exxon* appears to require "... that discrimination must be universal to offend the Commerce Clause. ..."

437 U.S. at 147 (Blackmun, J., concurring in part and dissenting in part).

Moreover, an analysis of the challenged Florida statutes demonstrates that the *Exxon* principles apply directly to this case. Section 660.10 of the Florida Statutes prohibits the performance of certain fiduciary functions by all corporations except: (1) bank and trust companies incorporated in Florida and possessing trust powers; and (2) national banking associations located in Florida and possessing trust powers. Section 660.10 does not preclude all out-of-state entry into the Florida market, for the statute applies only to corporations. Out-of-state individuals or other non-corporate entities are free to organize and own a firm with Florida trust powers and to provide the fiduciary services enumerated in section 660.10 through that entity. Additionally, section 660.10 by itself does not preclude all out-of-state corporations from providing trust services in Florida; it merely requires such corporations to establish subsidiary Florida trust companies and to obtain trust powers from the state. Clearly, then, section 660.10 in and of itself does not prohibit all out-of-state entry into the Florida market as the court below concluded it did; [12] it merely limits the entry of certain

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[12] As amicus New York Clearing House Association apparently recognizes, the status of section 660.10 in this litigation is somewhat unclear. *See* Motion to Affirm at 3, n.4. Its contention is that it was the ***combination*** of section 659.141(1) and section 660.10 which precludes BTNYC and BTIM from providing trust services in Florida and that it was this joint statutory exclusion (and not the independent constitutionality of section 660.10) which was invalidated by the court below and is at issue here. *Id.*

Amicus' contention is not correct. Section 660.10 does not prohibit BTNYC from establishing a trust office subsidiary in Florida; only section 659.141(1) does that. The court, however,

specific types of entities that choose not to comply with Florida's legitimate requirements for providing trust services in-state. *See Railway Express Agency* v. *Virginia*, 282 U.S. 440, 444; *cf. Robertson* v. *California*, 328 U.S. 440, 459.

Similarly, section 659.141(1) of the Florida Statutes does not prevent the flow of investment advisory services provided by *all* out-of-state firms into Florida; it merely limits, as did the statute in *Exxon*, the *types* of out-of-state concerns that are allowed to provide such services in-state. By its terms, section 659.141(1) applies only to banks, holding companies and trust companies. Thus, section 659.141(1) would not appear to bar other types of out-of-state corporations (such as brokerage houses, or investment counsel, for example) from opening branch investment advisory offices in Florida.

Furthermore, a holding company organized in any state may operate an investment advisory service in Florida if its operations are principally conducted in Florida; conversely, a holding company incorporated in Florida may not operate such a service if its operations are principally conducted out-of-state. Consequently, section 659.141(1) does not distinguish on the basis of out-of-state *origin* as did the New Jersey statute in *Philadelphia* v. *New Jersey*, 437 U.S. at 627.

Finally, Section 659.141(3) contains "grandfather" provisions which enable certain holding companies whose principal operations are conducted outside Florida to open investment advisory offices in Florida. Indeed, it appears that a subsidiary of BTNYC opened an affiliate investment advisory office in Florida in mid-1978 under these "grandfather" provisions. *See supra*, at p. 8, n.3; *American Banker*, Oct. 2, 1979, at 15.

appeared to believe that the prohibition against BTNYC's establishment of a trust company was contained in section 660.10 and declared that section as well as section 659.141(1) unconstitutional.

In short, BTNYC and BTIM are in the same position as the plaintiffs were in *Exxon*: if section 659.141(1) is enforced against them, they may not be able to provide trust services and investment advisory services in Florida, but other out-of-state firms will be able to do so. Thus, the challenged Florida statutes do not discriminate against interstate commerce and the claims of BTNYC and BTIM must fail because, as this Court noted in *Exxon*, "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." 437 U.S. at 127-28, *citing Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806.

2. *Sections 659.141(1) and 660.10 of the Florida Statutes do not unduly burden interstate commerce.*

It is true that a state statute which does not discriminate against interstate commerce may still be invalid if it unduly burdens such commerce. However, in determining whether a state statute, even though nondiscriminatory, is unduly burdensome, the degree of burden placed on interstate commerce must be balanced against the local purposes served by the statute. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142; *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 768-69; *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 371. Only if the burden on interstate commerce is clearly excessive in relation to the local benefits may the state statute be invalidated. *E.g., Aldens, Inc.* v. *LaFollette*,

552 F.2d 745, 749 (7th Cir. 1977), *cert. denied,* 434 U.S. 880.

The court below erroneously held that the two Florida statutes discriminated against interstate commerce and were, therefore, *per se* invalid. Consequently, the court below did not employ the balancing test required by *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137. In fact, application of that balancing test confirms the constitutionality of both statutes.

First, the burden on interstate commerce occasioned by the operation of the statutes is insubstantial, for, as noted previously, the statutes merely regulate the types of out-of-state concerns that may offer fiduciary and investment advisory services in Florida; they do not prohibit the entry of all out-of-state firms into the Florida market. Moreover, the Florida statutes and similar statutes in other states (*see* Appendix at p. 38, *infra*) embody legitimate state interests of long standing. Within our federal system, the legitimate interests of the state are not limited merely to public health and safety but rather extend to all matters which "protect the well-being and tranquility of a community," *Breard* v. *Alexandria,* 341 U.S. 622, 641, including the promotion of the local community's economic interests. Bikle, *The Silence of Congress,* 41 Harv. L. Rev. 200, 220 (1927); *see, e.g., Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 143; *Barbier* v. *Connolly,* 113 U.S. 27, 31.

Among the matters over which the states traditionally have been given broad authority are banking, *see Lewis* v. *Fidelity & Deposit Co.,* 292 U.S. 559; *Noble State Bank* v. *Haskell,* 219 U.S. 104, and related financial matters such as insurance, *see, e.g., Robertson* v. *California,* 328 U.S. 440; *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, and trust services, *American Trust Co.* v. *South Carolina State Board of Bank Control,* 381 F. Supp. 313, 320 (D.S.C. 1974), *citing Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144, 153. Whereas other nations such as Canada and the United Kingdom have chosen centralized national banking structures comprised of only a few large banks regulated by the national government, the United States has chosen a decentralized scheme consisting of many banks, which are chartered and regulated by a dual system of national and state banking authorities. Indeed, the geographical expansion of banks in this country is controlled largely by *state* laws and *state* supervisory authorities, *see* 12 U.S.C. § 36(c) (1976). This statutory scheme recognizes that geographical expansion may lead to the increased economic expansion (and power) of certain banks, and embodies a national policy judgment that the states and not the federal government should determine what form the banking and related financial structures within their respective boundaries should assume, and the degree to which the concentration of economic power in certain financial institutions should be allowed. *See First National Bank of Logan* v. *Walker Bank & Trust Co.,* 385 U.S. 252; *St. Louis County National Bank* v. *Mercantile Trust Co. National Association,* 548 F.2d 716 (8th Cir. 1976), *cert. denied,* 433 U.S. 909.

In this case, Florida has a legitimate interest in forestalling the entry of economically powerful out-of-state financial entities such as bank holding companies into the state of Florida, just as Maryland had a legitimate interest in limiting "the economic power of vertical integration" of petroleum dealers and refiners in Maryland, 437 U.S. at 142, and just as the state of Iowa

had a legitimate interest in forestalling the entry of economically powerful out-of-state bank holding companies into Iowa. *See Iowa Independent Bankers* v. *Board of Governors of the Federal Reserve System,* 511 F.2d 1288, 1294 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 875. This interest is, as appellant argued below (*see* 461 F. Supp. at 1214), based to a certain extent on the legitimate desire of the state to protect against undue economic concentration and thereby to encourage competition in the provision of investment advisory and fiduciary services. The state's interest is not confined to this important economic goal however. Statutes such as section 659.141(1) also serve to protect the public against unsound business practices because, as has been noted, state banking authorities have often found that it is difficult to obtain adequate control over out-of-state bank holding companies, many of which are too large and too far-flung to be regulated properly. 511 F.2d at 1294; G. Fisher, *Bank Holding Companies* 9 (1961).

Furthermore, an important social goal is also served by statutes such as section 659.141(1), for the state has a legitimate interest in furthering local control over important local industries such as banks and related financial services because of the positive impact such local control has on the level of civic involvement and related lifestyle values. *See, e.g., Great Western United Corp.* v. *Kidwell,* 577 F.2d 1256, 1283 (5th Cir. 1978), *rev'd on other grounds,* —— U.S. ——, 99 S. Ct. 2710; *Braeburn Securities Corp.* v. *Smith,* 15 Ill. 2d 55, 61, 153 N.E.2d 806, 809 (1958), *appeal dismissed,* 359 U.S. 311. A locally-controlled business has a stake in the future of the community. Policies are set with local conditions and needs in mind; and those occupying positions of importance in local businesses such as banks and

trust companies often give freely both of their time and money to improve the communities in which they are located.

In contrast, a large bank holding company such as BTNYC, which is controlled from afar and has its principal operations elsewhere, has little stake in the local community. In essence it is an absentee landlord concerned primarily with the profitability of its scattered enterprises. The management personnel selected for those enterprises usually will not be local individuals but rather persons brought in from outside the community by the parent corporation; and policies will be set, not with local needs or circumstances in mind, but rather in accord with the financial objectives of a far-flung conglomerate. As noted by the court in *Great Western United Corp.,* the presence of "benevolent management" is a legitimate state interest, 577 F.2d at 1283, and, as indicated in the debates on the 1956 Act, this interest was at least one factor motivating passage of the Act. *See* 101 Cong. Rec. 8021 (1955).

In short, the public policy rationale relied upon by this Court so many years ago in upholding, under the privileges and immunities clause, the right of the states to exclude and otherwise restrict the activities of foreign corporations within their borders, applies with equal force to the present case.

> . . . At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. *And if, when composed of citizens of one State, their corporate powers and franchises could be*

> *exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other states.* [*Paul* v. *Virginia*, 8 Wallace 168, 181-82, emphasis added.]

Like Virginia in *Paul*, Florida in this case is simply attempting to forestall widespread foreign control of certain fiduciary and financial services that are of central concern to the economic and social good of the state's communities and citizens.[13]

The nature of the specific services regulated by the Florida statutes further confirms the appropriateness of deferring to state control in this case. Section 660.10 prohibits certain out-of-state corporations from exercising certain fiduciary functions, including those of executor or administrator of an estate, those of guardian, and those of trustee. Congress has never itself sought to regulate these essentially "local" matters; to the contrary, it has indicated its intent to defer to state law in this area.[14] In short, section 660.10 governs an area traditionally left to the control and regulation

[13] *See* 2 Scott, *The Law of Trusts*, § 96.6 (3d ed. 1967). Scott indicates that the constitutionality of state statutes prohibiting banks or trust companies organized under the laws of another state from administering trusts within their respective borders is based primarily on the precedent established in *Paul* v. *Virginia*.

[14] *Blaney* v. *Florida National Bank*, 357 F.2d 27, 30 (5th Cir. 1966); *see* 12 U.S.C. § 92a(a) (1976) which authorizes the Comptroller of the Currency to permit national banks to provide fiduciary services only "when not in contravention of State or local law" and only to the extent that State banks, trust companies, or other corporations which come into competition with national banks are permitted to provide such services under state law. *See also First National Bank of Bay City* v. *Union Trust Co.*, 244 U.S. 416, 427-28.

of the states. *See, e.g., Labine* v. *Vincent*, 401 U.S. 532, 538; *American Trust Co.* v. *South Carolina State Board of Bank Control, supra*, 381 F. Supp. at 320; *In re Estate of Scott*, 418 Pa. 332, 211 A.2d 429, 431 (1965); 1 Scott, *The Law of Trusts* § 1.11 at 31 (3d ed. 1967).

Many states have sought to regulate the provision of fiduciary services in-state by enacting statutes similar to section 660.10 which, to various degrees, restrict the eligibility of non-resident individuals and foreign corporations to exercise fiduciary functions such as those of executor, administrator or trustee. Note, *Right of a Non-Resident to Qualify and Serve in Fiduciary Capacities—An Analysis*, 37 Va. L. Rev. 1119 (1951); *see* Annot., *Eligibility of Foreign Corporations to Appointment as Executor, Administrator, or Testamentary Trustee*, 26 A.L.R.3d 1019, 1026-29 (1969); Annot., *Eligibility of Foreign Corporations to Appointment as Trustee of Inter Vivos Trust*, 82 A.L.R.2d 946, 946 n.1 (1962); 2 Scott, *The Law of Trusts* § 96.6 (3d ed. 1967); 5 Scott, *The Law of Trusts* § 558 (3d ed. 1967).[15] Most of these state statutes, like section 660.10,

[15] These statutory prohibitions vary greatly from state to state. The observation made in 1944 by one well known authority in the trust field is equally applicable today:

> . . . Some states expressly prohibit out-of-state trust institutions from serving in any fiduciary capacity; others permit them to serve in only certain named capacities. Some states, known as the reciprocal states, provide that out-of-state trust institutions may serve in any capacity in which the state in which those institutions are located permits trust institutions of the other state to serve; some of these states name the capacities as to which they reciprocate with other states. Some states say they admit out-of-state trust institutions to serve in all fiduciary capacities; others, in certain named capacities; but, then, these states forthwith restrict this privilege by prescribing as a condition precedent that out-of-state trust institutions first must qualify as foreign corporations to do business in the state. Some of these states make it easy and inex-

have been in effect for many years, and help ensure that those entrusted with performing fiduciary duties on behalf of the state's citizens are thoroughly familiar with the local laws governing those duties. *See American Trust Co.* v. *South Carolina State Board of Bank Control,* 381 F. Supp. at 319. *See also Fennell* v. *Monongahela Power Co.*, 350 F.2d 867, 869 (4th Cir. 1965).

Similarly, section 659.141(1), which governs the control of investment advisory services, regulates an area of legitimate state interest. Professor Loss has reported that in 1961, 22 states regulated investment advisers; by 1969, the total had increased to 29. 1 L. Loss, *Securities Regulation* 47 (1961); 4 L. Loss, *Securities Regulation* 2219 (1969). *See also Marketlines, Inc.* v. *Chamberlain,* 63 Ill. App. 2d 274, 211 N.E.2d 399, 402 (1965).

Furthermore, Congress recognized the states' legitimate interest in regulating these services when it provided in the 1960 Amendments to the Investment Advisers Act of 1940, Pub. L. No. 86-750, § 16, 74 Stat. 885, 888, that

> [n]othing in [that act] shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State

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pensive, others difficult, if not impossible, for out-of-state trust institutions to qualify to do business. Some states draw a distinction between the right of out-of-state trust institutions to serve residents and their right to serve non-residents in fiduciary capacities. Still other states have no direct or express law on the subject, either legislative or judicial; and, in the absence of statute or judicial decision, succeeding Attorney Generals of the state have given conflicting opinions.

Stephenson, "Rights of Out-of-State Trust Institutions," 16 *Studies In Trust Business,* 2d Series 335 (1944), quoted in Note, *Right of a Non-Resident to Qualify and Serve in Fiduciary Capacities—An Analysis, supra,* 37 Va. L. Rev. at 1127-28.

> over any security or any person insofar as it does not conflict with the provisions of this subchapter or the rules and regulations thereunder. [15 U.S.C. § 80b-18a (1976)].

As noted in the Senate Report on the 1960 Amendments to the Act, this section was intended to "express clearly the [states'] concurrent jurisdiction in the area of investment advisers, in view of the important role which State authorities must play in the supervision of securities." S. Rep. No. 1760, 86th Cong., 2d Sess. 9 (1960), *reprinted in* 1960 U.S. Code Cong. & Ad. News 3502, 3511. Thus, as Congress recognized in enacting the 1960 Amendments,[16] the state government has a legitimate state interest in regulating the provision of investment advisory services for the benefit and protection of its citizenry, and this interest must be upheld unless the state regulation actually conflicts with the federal statutory scheme or the regulations promulgated thereunder. *See* 15 U.S.C. § 80b-18a (1976). Because section 659.141(1) in no way conflicts with the federal regulation of investment advisers (*see* 15 U.S.C. §§ 80b-1 *et. seq.* (1976); 17 C.F.R. §§ 275 *et. seq.* (1979)), it should be upheld as a valid exercise of Florida's police powers.

In short, Florida has longstanding and legitimate state interests in both of the areas regulated by sections 660.10 and 659.141(1) of the Florida Statutes: these interests are not outweighed by the insubstantial burden on interstate commerce which the statutes impose;

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[16] As this Court made clear in *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, Congressional recognition that a particular matter is "peculiarly a matter of state and local concern" is an important factor to be taken into consideration in determining the appropriate accommodation of state and federal interests. 362 U.S. at 446.

and, given the nature of the interests protected, no viable alternatives for protecting these interests are available.

II. Sections 3(d) and 7 of the Bank Holding Company Act of 1956 Permit the States to Adopt Laws Similar to the Florida Statutes Struck Down by the Court Below.

"It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens on it." *International Shoe Co.* v. *Washington,* 326 U.S. 310, 315. This Court has long recognized that Congress may permit states to impose restrictions upon interstate commerce in order to implement important state policies. *Kentucky Whip & Collar Co.* v. *I.C.R. Co.,* 299 U.S. 334. Thus, even if both Florida Statutes were found to burden interstate commerce to an extent which would otherwise be impermissible, they should nevertheless be upheld if Congress authorized Florida to enact such laws.

Congress has authorized the Florida statutes here at issue under sections 3(d) and 7 of the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1842(d) and 1846. These Florida statutes seek to regulate the in-state activities of fiduciary offices controlled by bank holding companies, and sections 3(d) and 7 authorize the states to enact such laws in order to preserve significant state regulatory interests in the area of fiduciary services.

Section 3(d) prohibits the Federal Reserve Board from approving an application by a bank holding company to acquire "any additional bank" located outside the state in which the holding company conducts its principal operations, unless the acquisition "is specifically authorized by the statute laws of the State in which the bank is located," expressly and not impliedly. 12 U.S.C. § 1842(d) (1976). The court below concluded that while section 3(d) allows restrictive state legislation affecting commercial banks operated by holding companies, it does not authorize the states to enact laws limiting fiduciary offices established by such companies. In reaching this conclusion, the court held that the clause "any additional bank" in section 3(d) must be construed narrowly by applying the literal definition of "bank" in section 2(c) of the Act, as amended in 1970, which defines "bank" to include those institutions which "(1) accept deposits that the depositor has a legal right to withdraw on demand, and (2) engage in the business of making commercial loans." 461 F. Supp. at 1200; *see* Bank Holding Company Act of 1956, § 2 (c), as amended, 12 U.S.C. § 1841(c) (1976).

The court's construction of section 3(d) was erroneous, because it ignored the interrelated legislative histories of sections 2(c) and 3(d), which show that Congress did *not* intend section 3(d) to apply only to the narrow class of financial institutions that accept demand deposits and make commercial loans. Section 3 (d) was added to the 1956 Act by an amendment sponsored by Senator Douglas. *See* 102 Cong. Rec. 6750-58, 6854-62 (1956). At the time Senator Douglas introduced the amendment to S. 2577, the term "bank" was defined broadly to include "any National banking association or any State bank, savings bank, *or trust company* . . . ." *See* S. 2577, 84th Cong., 1st Sess. § 2(c) (emphasis added). This broad definition was retained in the Act as finally passed. *See* Pub. L. No. 511, § 2(c), 70 Stat. 133 (1956). It was not until several years later that section 2(c) was amended so as to refer

only to institutions that accept demand deposits and make commercial loans.[17] Thus, at the time Congress considered and passed the Douglas amendment in 1956, the meaning accorded the term "bank" was intended to include fiduciary offices such as the proposed trust office of BTNYC, and it is this original meaning which must be considered in determining the scope of section 3(d). This the court below did not do.

Moreover, section 3(d) must be given a broad construction in order to preserve competitive equality between state and national banks. In section 3(d), as in other federal banking statutes, Congress has expressed an intent to foster competitive equality through deference to state regulatory standards and has mandated a liberal construction of these statutes to implement this intent. For example, in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. at 261, this Court held that section 7 of the McFadden Act, as amended, 12 U.S.C. § 36, which governs branching by national banks, embodies a Congressional policy in favor of competitive equality and therefore permits national banks to branch only if and to the extent that state banks are authorized to branch under the laws of the relevant states. And this Court later held that section 36 must be construed liberally in order to ensure competitive equality. *First National Bank in Plant*

[17] The definition of "bank" was partially amended in 1966 when the terminology "any institution that accepts deposits that the depositor has a legal right to withdraw on demand" was substituted for "any national banking institution or any state bank, savings bank, or trust company." Pub. L. No. 89-485, § 3(c), 80 Stat. 236. Then, in 1970, the provision was once again amended by adding the requirement that an institution, to be defined as a "bank," must also make commercial loans. Pub. L. No. 91-607, § 101(c), 84 Stat. 1760, 1762 (1970).

City v. *Dickinson*, 396 U.S. 122, 135-38. Similarly, Congress expressed its intention to preserve competitive equality in the area of trust operations in 12 U.S.C. § 92a, which permits national banks to exercise only those trust powers which state-chartered institutions may discharge under state law. *See, e.g., St. Louis County National Bank* v. *Mercantile Trust Co. National Association*, 548 F.2d at 720; *Blaney* v. *Florida National Bank*, 357 F.2d at 30.

In fact, as *amicus* New York Clearing House Association recognizes,[18] one of Congress' reasons for enacting section 3(d) was to prevent national banks from employing the device of bank holding companies to evade the state law branching restrictions incorporated in section 36 and thereby undermine competitive equality.[19] Thus, section 3(d), like sections 36 and 92a, must be interpreted broadly to reach fiduciary institutions operated by bank holding companies. Otherwise, national banks could gain a prohibited competitive advantage over state banks by having their holding companies establish numerous fiduciary subsidiaries across state lines without regard to the state law restrictions binding upon state banks.

The recent decision of the Eighth Circuit Court of Appeals in *Mercantile Trust Co.* illustrates the broad approach which should be applied in the case of section 3(d) in order to preserve competitive equality. In that case, St. Louis County National Bank sought a declaratory judgment that a branch trust office established by Mercantile Trust was illegal under 12 U.S.C. §§ 36(c)

[18] *See* Brief in Support of the Motion to Affirm at 11, n.12.

[19] *See, e.g.*, 102 Cong. Rec. 6860 (1956) (remarks of Senator Douglas); H.R. Rep. No. 609, 84th Cong., 1st Sess. 24 (1955).

and 92a, because Missouri state law did not authorize state banks to establish such offices. 548 F.2d at 717. Mercantile Trust argued, *inter alia*, that the trust office was not a branch within the meaning of section 36(f) because no deposits were received, or checks paid, or money lent at the trust office, within the literal terms of the federal statute. 548 F.2d at 717-18. The Eighth Circuit, however (unlike the court below in construing section 3(d)), refused to give section 36(f) such a restrictive reading. Relying heavily on the precedent established by this Court in *Plant City* and emphasizing the importance of defining "branch" so as to give full effect to the policy objective of promoting "competitive equality" between state and national banks, the Eighth Circuit concluded that "the three routine banking functions delineated in section 36(f) are not the only indicia of branch banking," and that "branch" therefore could not be accorded the narrow, restrictive meaning urged by appellee. 548 F.2d at 719. Instead, the Eighth Circuit held that the trust office was a "branch" because it conducted transactions generally carried on at the bank's main office, and because section 36(f) was clearly intended by Congress to embrace offices performing such transactions. 548 F.2d at 719-20.

An approach similar to that of *Mercantile Trust Co.* should have been taken by the court below in construing section 3(d). Like the trust office found to be a "branch" in *Mercantile Trust Co.*, BTNYC's proposed office was designed to conduct transactions within the general business of national banks. Congress manifestly intended section 3(d) to cover such offices, because their operation would constitute a type of banking business which must be subjected to state regulation in order to

guarantee competitive equality between state and national banks. Otherwise, national bank holding companies could establish interstate networks of fiduciary offices forbidden to state banks under state law, and thereby confer upon their subsidiary national banks greater economic backing and a resulting competitive advantage over state banks. In short, sections 659.141 (1) and 660.10 are clearly authorized by section 3(d), because they simply seek to regulate the conduct of a species of banking business by additional offices of bank holding companies.

The second provision of the 1956 Bank Holding Company Act that authorizes sections 659.141(1) and 660.10 is section 7, which reads:

> The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. [12 U.S.C. § 1846 (1976)].

To determine the appropriate scope and meaning of this provision, it is necessary to determine what powers and jurisdiction the states possessed in 1956 or thereafter acquired, for it has long been recognized that section 7 enables states to place much greater restrictions on bank holding companies than those that would otherwise apply under the 1956 Act.[20]

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[20] 102 Cong. Rec. 6751 (1956); P. Heller, *Handbook of Federal Bank Holding Company Law* 45-46 (1976); *see, e.g., Braeburn Securities Corp.* v. *Smith*, 15 Ill.2d 55, 153 N.E.2d 806 (1958), *appeal dismissed*, 359 U.S. 311.

One power the states clearly retain under section 7 is the power to prohibit the formation of bank holding companies and to exclude all bank holding companies from their boundaries. *See Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419, n.5; 102 Cong. Rec. 6752 (1956). Yet such total bans clearly burden interstate commerce considerably more than do lesser restrictions such as those contained in the Florida statutes.

In enacting section 7, Congress also intended to protect and preserve all the powers the states already possessed or would acquire in order "to preserve the dual system of National and State banks." 102 Cong. Rec. 6758 (1956). The preservation of this dual banking system is, in turn, dependent on the states' ability to ensure "competitive equality" between their respective state banks and national banking institutions. *See First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122; *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252. As noted above, Congress has enacted 12 U.S.C. § 36, which subjects national banks to the same branching restrictions as those imposed on state banks, and 12 U.S.C. § 92a, which allows national banks to perform only those fiduciary functions permitted to state-chartered institutions. At the heart of both statutes is Congress' recognition that the dual banking system cannot survive unless competitive equality is preserved between state banking institutions and national banking institutions.[21]

[21] *See First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261; *Blaney* v. *Florida Nat'l Bank*, 357 F.2d 27, 30 (5th Cir. 1966); *American Trust Co.* v. *South Carolina State Board of Bank Control*, 381 F. Supp. 313, 323 (D.S.C. 1974); *New Hampshire Bankers Ass'n* v. *Nelson*, 336 F. Supp. 1330, 1334 (D.N.H.), *aff'd*, 460 F.2d 307 (1st Cir. 1972), *cert. denied*, 409 U.S. 1001.

As illustrated by *American Trust Co.* v. *South Carolina State Board of Bank Control*, 381 F. Supp. 313 (D.S.C. 1974), it is Congress' policy in favor of competitive equality which must remain paramount in determining the scope of section 7 and the consequent constitutionality of state laws such as sections 659.141 (1) and 660.10. In *American Trust Co.*, the plaintiff, a North Carolina bank holding company, formed a South Carolina corporation to transact trust business in South Carolina. However, the plaintiff's subsidiary was barred from transacting such business by a South Carolina statute which prohibited domestic corporations controlled by corporations domiciled or licensed in states contiguous to South Carolina from serving as testamentary trustees. The court held the statute unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, but it also held that the statute did *not* violate the Commerce Clause or the Supremacy Clause of the United States Constitution, reasoning that 12 U.S.C. § 92a provides that a national bank may act as a fiduciary only "when not in contravention of state or local law," and that Congress' enactment of section 92a therefore permitted South Carolina to pass the challenged statute. The court concluded that the statute did not impose an impermissible burden on interstate commerce because the ban operated equally against state and national banks located in North Carolina and thereby preserved competitive equality. 381 F. Supp. at 323. The court also considered the constitutionality of a companion statute which required a bank holding company subsidiary to obtain approval from the State Board of Bank Control before commencing business. The plaintiff contended that the statute would be used to exclude it from transact-

ing trust business in South Carolina. The court, however, rejected plaintiff's contention that the statute burdened interstate commerce, holding, in effect, that section 7, in combination with section 92a, allowed such state regulation. 381 F. Supp. at 324.

The emphasis on assuring "competitive equality" between state and national banking institutions, which was of paramount importance in analyzing the challenged state statutes in *American Trust Co.*, is equally applicable to this case. The challenged Florida statutes, like those of South Carolina, do not discriminate between out-of-state national banking institutions and state banks or otherwise undermine the policy of encouraging competitive equality between these two classes of institutions. However, if the decision below is allowed to stand, the policy of ensuring "competitive equality" between state and national banking institutions will, in fact, be frustrated. As illustrated by *Mercantile Trust Co.*, 548 F.2d 716, national banks should not be permitted to establish branch offices for providing trust services where state banks cannot do so under state law. If the decision below is allowed to stand, the underlying policy of "competitive equality" will be circumvented because national bank holding companies will be given free rein to establish as many trust offices across state lines as they wish and, thereby, give their subsidiary national banks increased economic resources and an unlawful competitive advantage over state banks which are precluded from establishing any branch offices for providing fiduciary services.

In short, because the bank holding company is a favorite device for circumventing restrictive state branching laws, *Iowa Independent Bankers* v. *Board of Governors of the Federal Reserve System*, 511 F.2d at

1291, *Braeburn Securities Corp.* v. *Smith*, 15 Ill.2d at 61-62, 153 N.E.2d at 810, Congress enacted section 7 in order to permit the states to place limitations on holding company activities. Florida Statutes sections 659.141 (1) and 660.10 simply seek to prevent BTNYC from operating facilities which would not be permitted to state banks under similar circumstances. Thus, the challenged statutes are authorized by section 7 of the 1956 Act. *See American Trust Co.* v. *South Carolina State Board of Bank Control*, 381 F. Supp. at 324.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the court below.

Respectfully submitted,

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November, 1979

APPENDIX

The rationale of the decision of the court below could place a significant number of other state statutes in jeopardy, including:

1) Ill. Ann. Stat. ch. 32, § 157.102 (Smith-Hurd 1954)
2) Kansas Stat. Ann. §§ 59-1701, 59-1702 (1976)
3) Ky. Rev. Stat. Ann. § 287.030(2) (1978 cum. supp.)
4) Minn. Stat. Ann. §§ 303.04, 303.25 (West 1969)
5) N.C. Gen. Stat. § 55-132(b) (1975)
6) Or. Rev. Stat. § 715.025
7) Pa. Stat. Ann. tit. 7, § 106(b) (Purdon 1978-79 cum. supp.)
8) Tex. Prob. Code Ann. tit. 17A, § 105A(c) (Vernon 1978-79 cum. supp.)
9) Va. Code § 6.1-5. (1979)
10) W. Va. Code § 44-5-3 (1979 cum. supp.)